In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1351

INTERBORO CONTRACTORS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–15a) is reported at 432 F. 2d 854. The Board's supplemental decision and order (Pet. App. 16a–29a) are reported at 175 NLRB No. 107.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–2a) was entered on November 23, 1970. The petition for a writ of certiorari was filed on February 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether, in administrative proceedings to determine back-pay liability, an employer is entitled to take pretrial depositions or, in the alternative, to obtain an adjournment of the proceedings.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations and Statements of Procedure are set forth at Pet. 3–4 and in the Appendix, *infra,* pp. 11–14.

STATEMENT

On March 31, 1966, the Board issued a Decision and Order (157 NLRB 1295) finding that petitioner had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging its employees John and William Landers for engaging in protected concerted activities. The Board ordered the Company, *inter alia,* to make the two employees whole "for any loss of pay they may have suffered by reason of their discharges." 157 NLRB at 1304. The United States Court of Appeals for the Second Circuit enforced the Board's order. 388 F. 2d 495.

After entry of the court's decree, informal efforts were made to agree on the amount of backpay due the two claimants. When these efforts failed, the Board's Regional Director issued and served on the Company a backpay specification and notice of hearing, as provided by the Board's regulations. 29 C.F.R. 102.52–102.59. The specification showed, for each employee on a calendar quarter basis, the gross wages which he

would have earned, his interim earnings from other employment, his expenses, the net backpay due, and other pertinent information (Pet. App. 30a–37a). The specification also stated that a hearing on the allegations of the specification would be held before a Trial Examiner on August 5, 1968[1] (Pet. App. 38a). Although the Board's Rules require a detailed and responsive pleading (29 C.F.R. 102.54(b)), the Company made only a general denial in its answer (R.258).[2]

About three weeks before the hearing, Company counsel requested and received five subpoenas from the Regional Director;[3] these were never used (Pet. App. 6a). The Company also filed an application to take depositions of the backpay claimants (R. 262–263). The Regional Director denied the application on the ground that good cause had not been shown (R. 264). On August 2, the Company renewed its

[1] The hearing was subsequently rescheduled and held on August 21 and 22, 1968.

[2] "R" refers to the appendix to the briefs in the court below.

[3] These subpoenas were (Pet. App. 6a, n. 1):

"(1) A subpoena addressed to the Unemployment Insurance Board of New York to produce all records relating to the Landers' application for unemployment insurance during the back-pay period;

"(2) a subpoena addressed to the pension and welfare fund of the Union for the production of all records of contributions made on behalf of the Landers and of all benefits paid to the Landers during the back-pay period;

"(3) a subpoena addressed to the Union for the production of all its records pertaining to the Landers;

"(4) a subpoena *ad testificandum* addressed to Mrs. John Landers; and

"(5) a subpoena *ad testificandum* addressed to Mrs. William Landers."

application, asserting that it was entitled to depose the claimants "in order to enable the respondent to adequately prepare for trial or hearing" (R. 265–266). The Regional Director reaffirmed his denial for want of good cause, adding that "insofar as your application may be deemed a motion for discovery * * * the Board's Rules do not provide for discovery proceedings" (R. 267).

Meanwhile, the Board's General Counsel requested the Examiner to accept certain allegations of the backpay specification as admitted and true because of the Company's failure to state specifically its basis for any disagreement therewith (Pet. App. 21a). Although finding the General Council's motion "not altogether without merit" (Pet. App. 21a–22a), the Trial Examiner denied it and directed that the hearing proceed (R. 36–37). The Company then moved to take depositions from the two claimants for the purposes of discovery (R. 37, 270–271). The Examiner denied this motion on the ground that the Board's Rules (29 C.F.R. 102.30; App., *infra*, pp. 11–14) provide for the taking of depositions chiefly for the purpose of recording the testimony of witnesses who cannot appear at the hearing, and not for the purpose of discovery (R. 41–43).

Thereafter, both claimants were called to testify by the General Counsel and were cross-examined by the Company. At the conclusion of the cross-examination, Company counsel moved for an adjournment contending that he was not prepared to present his case (Pet. App. 27a; R. 173–174). In particular, he asserted that

he was "not prepared to go forward to prove the records of the Unemployment Insurance Bureau * * *" (Pet. App. 27a; R. 174);[4] that he wished to call several witnesses from a trade association, who he stated were the only ones qualified to testify regarding employment opportunities in the industry in New York City, but who were out of town;[5] and that he was not prepared to offer evidence controverting the Landers' testimony regarding their efforts to secure interim work from other employers (R. 179).[6] The Trial Examiner ruled that the Company had not shown sufficient grounds for an adjournment (Pet. App. 28a; R. 183–184). The Company offered no evidence and the hearing was closed (R. 185).

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[4] One of the subpoenas counsel had obtained three weeks before the hearing, n. 3 *supra*, was a subpoena *duces tecum* addressed to the New York State Unemployment Insurance Board for the production of records, documents, correspondence and memoranda relating to John and William Landers.

[5] The Company had made no effort to obtain a postponement of the hearing or to depose these witnesses upon learning that they would be unavailable. Upon being asked by the Trial Examiner to identify them, counsel for the Company refused on the ground that he was "not going to divulge [his] case" (R. 176).

[6] The Landers had testified that they registered for work with the Union on a regular basis, thereby making themselves available at any of approximately 300 area employers (Pet. App. 26a–27a; R. 119–120, 144–145, 152). One of the unused subpoenas issued to the Company, n. 3 *supra*, was for Union records pertaining to the Landers. Another of the unused subpoenas was for records of the Unemployment Insurance Board which included, *inter alia*, records pertaining to the efforts made by the Landers to secure interim employment (R. 124).

The Trial Examiner issued a decision finding the Company liable for backpay as set forth in the specification, with some modification (Pet. App. 23a–24a, 29a). The Company filed exceptions, and the Board affirmed the Examiner (Pet. App. 16a–18a). Accordingly, the Board ordered the Company to pay John and William Landers $6,558 and $7,489, respectively, less any withholding required by law, plus interest (Pet. App. 18a, 29a).

The court of appeals enforced the Board's order (Pet. App. 3a–15a). The court agreed with the Board's interpretation of its own rules as conferring no right to take depositions for purposes of prehearing discovery (Pet. App. 4a). The court further found that the Board's denial of the Company's requests to take depositions and for an adjournment did not prejudice it (Pet. App. 13a–14a).

ARGUMENT

1. Petitioner's primary contention is that it was deprived of a fair hearing by the denial of its motions for depositions for purposes of pretrial discovery (Pet. 8–16). This issue does not warrant further review.

As the court below properly noted, it is "well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right," and that "the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures" (Pet. App. 8a–9a). Moreover, while Board Rule 102.30 (29 C.F.R. 102.30, App., *infra.*, pp. 11–14) provides for the taking

of depositions upon a showing of good cause, that rule "does not on its face, or as interpreted by the Board, provide for the taking of depositions for the purpose of pre-trial discovery" (Pet. App. 10a). The Board's consistent interpretation of the rule has been that it provides for depositions only for evidentiary purposes—obtaining and preserving evidence for trial—and that a desire for discovery is not "good cause" under the rule.[7] See, *e.g.*, *Walsh-Lumpkin Wholesale Drug Company*, 129 NLRB 294, 296 n. 8; *Del E. Webb Construction Company*, 95 NLRB 377 n. 2; *W. H. Sackett d/b/a Sackett Transp. Co.*, 169 NLRB No. 57. Since the rule was not adopted under the compulsion either of the Constitution or of a statute (Pet. App. 8a–9a), this interpretation is controlling.

The Fifth Circuit's construction of the rule as permitting depositions for discovery purposes *National Labor Relations Board* v. *Safeway Steel Scaffolds Company of Georgia*, 383 F. 2d 273, certiorari denied, 390 U.S. 955; *National Labor Relations Board* v. *Miami Coca-Cola Bottling Company*, 403 F. 2d 994, does not require review here. Neither of those decisions found the refusal to permit discovery in the

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[7] The intepretation is soundly based. Board hearings, like this one, are generally no more than a few days long, so that the complexity and need for streamlining which warrant discovery are absent, while the procedure itself invites delay and disputation over peripheral issues. Moreover, the need for protecting the confidentiality of the employees' pre-trial statements which exists in Board proceedings makes the discovery question more like that which obtains in criminal proceedings. Cf. *National Labor Relations Board* v. *Vapor Blast Manufacturing Company*, 287 F. 2d 402, 407–408 (C.A. 7), certiorari, 368 U.S. 823.

particular case to have been prejudicial; here, too, there was no prejudice, for "the Company's counsel had ample opportunity to cross-examine the Landers at the hearing about the matters on which he wanted to depose them" (Pet. App. 14a; R. 123–140, 146–171). Thus, there is no operative conflict among the circuits requiring this Court's intervention. Petitioner, perhaps recognizing this, does not assert the conflict as a reason for granting the writ, although referring to it in its statement. (Pet. 7.)

2. Petitioner's further contention (Pet. 16) that the denial of an adjournment deprived it of a fair hearing also presents no issue warranting further review. It is well settled that the determination whether to grant a continuance is a matter largely left to the discretion of the Trial Examiner. For the reasons given by the court below (Pet. App. 14a–15a), the Examiner did not abuse his discretion here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1971.

APPENDIX

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SECTION 10 * * *.
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> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C. title 28, secs. 723–B, 723–C).

The relevant provisions of the National Labor Relations Board Rules and Regulations and Statements of Procedure (29 C.F.R. 102.1, *et seq.*) are as follows:

> SEC. 102.30 *Examination of witnesses; depositions.*—Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application shall be made to the regional director prior to the hearing, and to the trial examiner during and subsequent to the hearing but before transfer of the case to the Board pursuant to section 102.45 or section 102.50. Such application shall be served upon the regional director or the trial examiner, as the case may be, and upon all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or trial examiner, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served upon all the other parties by the regional director or upon all parties by the trial examiner.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any

agent of the Board authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered mail to the regional director or the trial examiner, care of the chief trial examiner in Washington, D.C., or associate chief trial examiner, San Francisco, California, as the case may be.

(d) The trial examiner shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

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